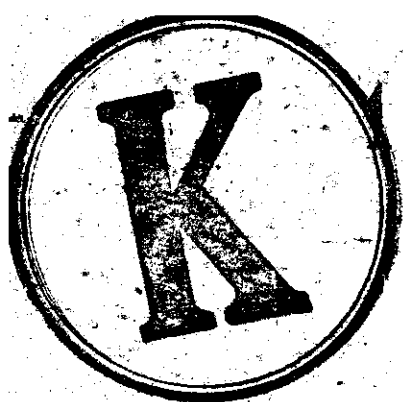




948.

File No. O. Govt. of India
pt-I 148
Legal Department
A BRANCH

Subject:— Opinions under the
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BKS. 7/6/ 40.

Office of the R.L.A.

Section 78 of the Government of India Act, 1935 requires the Governor to cause to be laid before the Chambers of the Legislative ^{ure} the annual financial statement. It will, therefore, be necessary to submit to the Governor the papers regarding laying the statement of expenditure before the Assembly and before the Council. It is not necessary for the Governor to fix any dates for the presentation of the Statement and therefore papers in that connection need not be submitted to the Governor.

2. As regards the dates fixed for the presentation, voting and discussion of the supplementary demands, it is for consideration whether according to the assurance given by Government the dates for the presentation of the supplementary demands and for their discussion by the Council have to be so fixed as to enable the members of the Council have to be so fixed as to enable the members of the Council to make their suggestions before they are finally passed by the Assembly. Attention is in this connection invited to the L. C. Office note of 19-7-1946. However, as the R.L.A. observed on the last occasion in his note dated 16-9-1947 which was approved by Government, this is a matter of convention and depends upon Government's convenience.

Copy attached.
** Do -

3. In fixing the dates for the budget programme seems that F.D. has overlooked the fact that 26th March 1948 is a public holiday (Good Friday). F.D. should rearrange the dates.

Sd/-P.M.L.
16/2

Remembrancer of Legal Affairs.

U.R. to F.D., No. 1632 Dated the 16th February 1948.

No. 2081
Office of the R.L.A.
Bombay Castle, 1st March 1948.

From:

P.M.Iad, Esquire, I.C.S.,
Remembrancer of Legal Affairs.

To:

Lt.Col. A.A.G.,
H.Q.Bombay Area,
Colaba, Bombay.

Subject: Discipline: Bonded Civilian Staff.

Sir,

With reference to your letter No.318/1/A dated the 23rd October 1947 on the above subject, I have the honour to state as under.

The question raised for consideration is under what code or law an individual should be charged as stated in paragraph 3 of the G.H.Q. letter No. 0322/52/Q/OS-10A, dated 23rd June 1947. The ~~spixian~~ position under the Government of India Act, 1935, was that the provisions of sections 235 to 237 were specially made applicable in relation to persons who not being members of His Majesty's Forces held positions in India connected with the equipment or administration of those Forces or otherwise connected with defence as they applied in relation to persons who were members of those Forces: section 238. This section was specially intended for civilian personnel in the Defence services. The whole Chapter I in Part X in which this section figured has now been repealed by the Adaptation Order. It is stated that the Active Service Ordinance, 1941, has also been repealed.

However, the Joint Defence Council Order, 1947, gives exclusive control to that Council for the general administration of naval, military and air forces' law and the maintenance of discipline in the armed forces of each of the two Dominions. The expression "armed forces" has not been defined either in the Indian Independence Act or in the Joint Defence Council Order. If it is

is understood to be wide enough to include in civilian personnel in the Defence services, such personnel would naturally come under the control of the Joint Defence Council, and that Council must have presumably made provision for their discipline. I am further given to understand that members of such personnel had formerly signed agreements putting themselves under the jurisdiction of the military law for all purposes. Inquiries may be made whether these agreements are still in force. If in force, they would naturally supply the authority under which action can be taken.

These are the only two possible comments which this office can make. It is presumed that the Ministry of Defence would be better able to enlighten the Head Quarters, Bombay Area, upon these points.

Your obedient servant,

Sd/-P.M.L.
28/2

Remembrancer of Legal Affairs.

BKS. 5/6/ 40.

Office of the R.L.A.

By the Matheran Tramway Order, 1904, issued under section 6 of the Indian Tramways Act, 1886, Abdul Hussein Adamjee Peerbhoy was authorized by the Governor of Bombay-in-Council with the previous sanction of the Governor-General in Council to construct a line of light railway under the conditions of the said Act between Neral station on the Great Indian Peninsula Railway and the hill station of Matheran. Under clause 40 of that Order, the promoter has been empowered to transfer the undertaking with the assent of the Governor-in-Council previously obtained but not otherwise to any other person or persons or a company. Under clause 43, the Governor-in-Council is given the power to purchase the undertaking by giving to the promoter not less than six calendar months' notice in writing of his intention to do so. The Managing Director of the Matheran Steam Light Tramway Company, Ltd., has requested the Bombay Government's approval to sell for Rs.4 lakhs all the physical assets and properties of the Tramway to the Railway Board through the G.I.P. Railway. The question raised for the consideration of the R.L.A. is whether the permission of this Government or of the Central Government would be necessary under clause 40 to the transfer of the undertaking specially in view of the fact that the Railway Board wishes to purchase it under clause 43 of the Order.

Under section 311(2)(c) of the Government of India Act, 1935, 'railway' includes a tramway not wholly situate within a municipal area; 'Federal Railway', as defined in the same clause, does not include an Indian State

railway but save as aforesaid includes any railway not being a minor railway. 'Minor railway' is also defined in the same clause as meaning a railway, which is wholly situate in one unit and does not form a continuous line of communication with a Federal railway, whether of the same gauge or not; and 'unit' means a Governor's Province, a Chief Commissioner's Province or an acceding State. The Matheran Light railway is not situate in a municipal area, and is wholly situate in the Province of Bombay; but it is not known whether it forms a continuous line of communication with the G.I.P. Railway. Assuming that it so does, it would be deemed to be a Federal railway. It appears from P.W.D. files that that Department has been treating it as a Federal railway. The Department may verify the assumption.

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Under section 6(1) of the Indian Tramways Act, 1886, before it was adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, the power vested in the local Government. Consequently the Matheran Tramway Order, 1904, was issued by the Governor of Bombay-in-Council and the power to give sanction to the transfer of the undertaking was reserved to the Governor-in-Council under Clause 40. However, after the Government of India Act, 1935, came into operation, the position has changed. Under section 6(1) of the Indian Tramways Act, as adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, the power vests in the Government to issue the order authorizing the construction of a tramway. "Government" as defined in section 6 clause (16) in relation to any tramway which is or when completed will be, a federal railway as defined in sub-section (2) of section 311 of the Government of India Act, 1935, means the federal railway authority and in relation to any other tramway means the Provincial Government. "Federal railway authority" as defined in section 3 clause 18(b) of the General

Clauses Act, 1897, shall mean the Federal railway authority constituted by the Government of India Act, 1935, or, before the establishment of that authority, the Central Government. The Federal Railway authority has not been constituted at all. Consequently "Government" as contemplated by section 6(1) read with section 3 clause (16) of the Tramway Act would mean the Central Government. It follows, therefore, that the authority competent give sanction to the transfer of the undertaking under clause 40 of the Matheran Tramway Order, 1904, would be the Central Government, on the assumption that it is a Federal Railway. If this assumption be not correct, the sanction of the Provincial Government would be necessary.

Under clause 43 of the Matheran Tramway Order, 1904, the power to purchase the undertaking vests in the Central Government, and that power can be exercised in 1950 or at the expiration of any subsequent period of five years. The amount of purchase money has to be assessed as provided in clauses 43 and 44. The Central Government will presumably satisfy itself that the purchase at this juncture at the price quoted is more advantageous than purchase in 1950 at a value to be assessed under clause 43 and 44.

Sd/-P.M.L.

14/3

Remembrancer of Legal Affairs.

U.R. to P. W.D. No. 2563 dated the 15th March 1948.

BKS. 5/6/ 4c.

Government have set up District Rural Development Boards and have proposed to appoint members of the Legislative -----Assembly as full-time Secretaries thereof and pay them an honorarium of Rs.100/- p.m. The question that arises for R.L.A.'s consideration is whether by reason of acceptance of the proposed honorarium of a member of the Legislative Assembly will incur disqualification under clause (a) of sub-section (1) of section 69 of the Government of India Act, 1935.

2. Section 69(1)(a) of the Government of India Act, 1935, provides that a person shall be disqualified for being chosen as, and for being, a member of a Provincial Legislative Assembly or Legislative Council if he holds an office of profit under the Crown in India other than an office declared by an Act of the Provincial Legislature not to disqualify its holder. The expression "office under the Crown in India" has not been defined in the Government of India Act. However, section 69(1)(a) in which this expression occurs seems to have been modelled on section 24 of Succession to the Crown Act, 1707 (6 Anne c.41) and other Acts whereunder any person who accepts an office of profit under the Crown created since October 25, 1705, is incapable of being elected to, or, if already elected, of continuing to sit or vote in the House of Commons unless statutory provision has been made to the contrary in respect of any particular office, the main object being to exclude from the Parliament persons supposed to be under the influence of the Crown (see Rogers on election Vol.II p.10). The object of section 69(1)(a) is obviously to disqualify persons who will be under the influence of the Crown by reason of acceptance of any office of profit under the Crown, for, in such cases the duty of a member of the Legislature is bound to conflict with his interest in the office to which he is appointed; especially in this case where the office involves whole-time employment. An office under the Crown need not necessarily be service

falling under Part I of the Government of India Act, 1935. If a person holds any post to which he is appointed by the Crown and if he is paid out of the Crown revenues, he can be considered as holding an office of profit under the Crown. It follows, from this that a member of the Legislative Assembly appointed to be a whole time Secretary of the Rural Development Board will incur disqualification under section 69(1)(a) on the ground that he has by reason of acceptance of an honorarium held an office of profit under the Crown within the meaning of the said section.

sd/- P.M.L.
22/5
Remembrancer of Legal Affairs.

U.R. to A.R.D. No. 4925, dated the 22nd May 1948.
(Please also see R.L.A.'s No. 14529, dated 14-12-49)

BKS. 5/6/ 4c.

No. 28 of 1948.

Advocate General's Chambers,
High Court,
Bombay, 2nd June 1948.

Subject:- F.D. Reference - Levy of Town Duty on petroleum
by the Bombay Municipality.

O P I N I O N.

Entry No.32 in the List I in the 7th Schedule runs as follows:- "Petroleum and other liquids and substances declared by the Federal Law to be dangerously inflammable, so far as regards possession, storage and transport". The effect of imposing a town duty is a condition of import into the municipal limits, ^{and} does ~~not~~ put a clog on transport. It imposes a condition affecting transport of petroleum from outside such limits into those limits. The reference to ~~Entry~~ Entry 2032 in the case of the "Lahore Municipality vs Delatram Kapur, 1942, Federal Court Reports, page 31, has no direct bearing, but was made by way of a contrast to Entry No.47, the Court opining that the limitation under Entry No. 32 assisted it in holding that there being no limitation ⁱⁿ ~~under~~ Entry No.47 which referred to "Salt", that Entry must be taken to include every possible dealing with "Salt" including taxation. The reference to Entry No.32 as also to Entry No.31 was incidental, but it is clear that to the extent of the Entry, it is completely comprehensive, and the word "Transport" would include within it everything which it affects it.

In my opinion the imposition of the proposed Town Duty would conflict with Entry No.32 in the Federal List and would not be competent.

Advocate General.

Office of the R.L.A.

A copy of the Advocate General, Bombay's opinion No.28 of 1948 is forwarded herewith.

As the case involved taxation and interpretation of the Constitution Act the R.L.A. discussed it with the Advocate General and put forth the view which has now been endorsed by the Advocate General. The opinion of the Advocate General was not received till 8th instant , and it is now being forwarded to the Department.

Sd/-P.M.L.
11/6

Memembrancer of Legal Affairs.

U.R. to F.D., No. 5477 , dated the 12th June 1948.

BKS. 5/6/ 4c.

In G.R. No. 459/46, dated 18th January 1947 it is stated that Government have established a Board to be known as the Bombay Provincial Housing Board with a view to formulating a long range housing policy and undertaking an immediate programme for the purpose of encouraging and facilitating private enterprise to build houses and for building houses through the agency of Government or Local bodies. The main object in setting up the Board is stated to be the provision of increased housing accommodation conforming to approved standards. It appears that in view of R.L.A.'s opinion dated 17th December 1946 the character of the Board as originally proposed was changed and it was provided that the function of the Board should be merely advisory. The opinion of the R.L.A. appears to have been based on the opinion of the Advocate General No. 16, dated 24th July 1944 in the Electric Grid case. The R.L.A. seems to have held that the powers and functions of the Housing Board are in the nature of a trading corporation and as the proposals relate to its incorporation and regulation, the subject matter fell within the scope of item No. 33 in List I in the Seventh Schedule to the Government of India Act, 1935, and the Central Government and not the Provincial Government could legislate for the same.

2. I am afraid that this is too narrow a view to take. At the present juncture the scarcity of housing accommodation is too patent to need any proof. In the interest of the Public health of the Province, it is the duty of every Government to take measures to satisfy the need. Under item No. 14 in List II in the Seventh Schedule it is competent to a Provincial Government to legislate for the purpose. So also under entry No. 13 Government can legislate in respect of Municipal Corporations and Improvement Trusts. There was an Improvement Trust in existence in Bombay. But the functions of the Trust have been taken over by the Bombay Municipal Corporation

and are at present performed through its Improvement Committee. Section 354C of the City of Bombay Municipal Act, 1888 specifies the purposes for which Improvement Scheme can be prepared. One purpose actually is the construction of buildings for the accommodation of the poorer and working classes. It can be conceived that if Government had so decided it would have been competent to them to amend the City of Bombay Municipal Act and to empower the Bombay Municipality to provide for building schemes for the accommodation of not only the poor but also the needy. Such a provision would have been perfectly legal as being a measure intended "to promote public health or convenience" (see section 63 of the City of Bombay Municipal Act). If in the discharge of such function a statutory corporation is required to trade or to do the business of buying or selling, it would be a function which is merely incidental or ancillary to the discharge of its duty in the promotion of public health or convenience. It was well established that if the Constitution Act confers certain powers on a legislature, it has also powers which are incidental or ancillary to the exercise of those powers. Thus in *Gallagher v. Lynn* (1937) A.C. 863 the Privy Council held that if on the view of the Statute as a whole, it is found that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. In that case the Milk and Milk Products Act passed by the Government of Northern Ireland to regulate the supply of milk was held to be an Act for the peace, order and good Government of Northern Ireland for the securing of the health of its inhabitants by protecting them from the dangers of an unregulated supply of milk. The Act was held not to be ultra vires, although it affected "trade with places outside Ireland" for which it had no power to

legislate. A similar view has been taken in India in regard to Money Lenders Acts and Debt Relief Acts, although these Acts incidentally provided for matters outside the authorised field. (1940) F.C.R. 188, (1944) F.C.R. 126). This view has been recently upheld by the Privy Council in Prafulla Kumar v. Bank of Commerce, Khulna, 49 Bom. L.R. 568. In that case the Privy Council refused to accept an argument that a Provincial Law was ultra vires, if it was within the express power of the Legislature but if it incidentally affected an entry in the Federal list. Their Lordships observed that subjects must always overlap and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, such beneficent ~~legislation~~ legislation would be stifled at birth and many of the subjects entrusted to Provincial Legislatures could never effectively be dealt with. A Provincial Legislature can legislate for the establishment of a statutory board to provide for housing accommodation and to carry out its housing programme. Its functions to acquire, buy and sell lands or to control building materials may be considered as trading functions. But these functions will only be incidental or acillary to the main functions of the Board. It does not appear that any legislation for the establishment of such a board will fall under entry No. 33 in the Federal List. That entry provides for corporations i.e. to say the incorporation, regulation and winding up of trading corporation. It does not appear that the establishment of a statutory board to provide for housing accommodation with various objects set out in the Government resolution referred to above will be ultra vires of the powers of the Provincial Legislature.

3. The Electric grid case is in my opinion distinguishable. In that case Government intended to take power to issue stock for providing a fund of the Board. All the English cases including the Scotch case on which the Advocate General has based his decision in that case merely provide that corporations which do the business of buying and selling are trading concerns and their profits are liable to income and other taxes. It does not appear to me that these cases are of much use for deciding the point at issue in the present case. These cases may be useful in the present case only so far as to show that the trading element would be present in the operations of the proposed Board. But if it is competent to the Provincial Legislature to establish such a board under items 13 and 14 of List II, I should think it is immaterial that such board can be said to be trading.

4. For the above reasons I would suggest to the Labour Department to formulate its proposals for the establishment of the proposed Board. After the proposals are received, a draft of the bill will be prepared and will be sent to the Advocate General for opinion.

Bd/-J.R.D.
16/6

Additional Secretary to Government.

U.R. to Labour Department, No. 5614, dated the 16th
June 1948.

BKS. 5/6/ 40.

Office of the R.L.A.

Unless powers of the Central Government under section 19 of the Sea Customs Act, 1878 or section 3 of the Imports and Exports (Control) Act, 1947 have been delegated to the Provincial Government, it does not appear that there is any existing law under which it would be competent to the Provincial Government to prohibit or restrict the export of undeveloped films from the Province of ~~Amam~~ Bombay.

Sd/-P.M.L.,

19/6

Remembrancer of Legal Affairs.

U.R. to H.D. (Poll.) No. 5762 dated 21st June 1948.

BKS. 5/6/ 4c.

Legal Department.

The proposal is to establish in the Province an Industrial Finance Corporation on the analogy of the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948. The sphere of work of the Provincial Industrial Finance Corporation will be broadly related to small and medium scale industries while the Central Corporation will be concerned with large scale industries. The question for R.L.A.'s consideration is whether the Provincial Legislature is competent to promote legislation for the establishment of an Industrial Finance Corporation similar to one set up under the Central Act.

The main provisions of the Industrial Finance Corporation Act, 1948, are as follows :

Section 3 of the Act sets up the Industrial Finance Corporation of India which is a body corporate having perpetual succession and a common seal with power to acquire both moveable and Immoveable property. Section 4 empowers the Corporation to issue shares. Section 21 gives the Corporation power to issue and sell bonds and debentures carrying interest for the purpose of raising its working capital. Section 22 authorizes the Corporation to accept deposits from the public repayable after expiry of a certain period. Section 23 mentions the kinds of business which the Corporation may carry on and transact. One of the kinds of business is the granting of loans or advances to or subscribing to debentures of industrial concerns on the security of sufficient pledge, mortgage, hypothecation or assignment of Government or other securities, stocks, shares or secured debentures, bullion, moveable or immoveable property or other tangible assets. Section 32 of the Act empowers the Corporation to declare a dividend out of its net annual profits. There is no doubt that the

subject matter of an enactment containing such provisions will fall in Entry 33 in the Federal Legislative List.

A Corporation with objects such as those contained in the above provisions will be a trading corporation and also a banking and financial corporation within the meaning of entry 33. The provisions in so far as they relate to accepting of deposits from the public and granting loans on securities will also fall in entry 38 of the Federal Legislative List. That entry relates to banking, that is to say, the conduct of banking business by Corporations other than Corporations owned ~~by the Government or controlled by an acceding~~ State and carrying on business only within that State. As observed by the Privy Council in the case *Tennant vs. The Union Bank of Canada* (1894) A.C. 31, banking is an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker. The business of receiving from depositors deposits and repaying those deposits to the depositors as also granting loans on securities is a legitimate business of a banker (See section 8 of the Imperial Bank of India Act, 1920, read with Schedule I). It will, therefore, follow that the Provincial Legislature will not be competent to enact a law containing any of the provisions referred to. The proper course seems to set up a limited Company as proposed in Madras, which will be governed by the Indian Companies Act in regard to various matters including its liquidation.

Sd/-J.R.D.

24/6

Additional Secretary to Government.

U.R. to E. and I. Department, No. 5926, dated the

24th June 1948.

BKS.
5/6/
40.

Office of the R.L.A.

Article XV of the covenant entered into by the Rulers of Kathiawar States for the formation of the United State of Kathiawar provides that the Government of Kathiawar shall, in consultation with the Government of India and the Government of Bombay, take all steps necessary to set up a Joint Advisory Council, consisting of Ministers of Kathiawar and Ministers of the Province of Bombay, for investigating and discussing subjects of common concern and making recommendations thereon and in particular recommendations for the better co-ordination of policy and action with respect to any such subject. In pursuance of this provision, the Government of Saurashtra have now communicated to the Government of Bombay their intention to set up an Advisory Council, and their decision selecting the Chief Minister and the Deputy Chief Minister as members of the Council. The Government of Bombay is invited by the same letter to nominate two Ministers of the Province of Bombay on the Council. Certain subjects of common interest, such as prohibition policy, linking of the trunk roads between Kathiawar and Gujarat, differentiation in college fees, are mentioned as subjects for the agenda of the first meeting of the Council. In their letter dated the 22nd May 1948, the Ministry of States, Government of India, also suggest that it would be appropriate if two Ministers of Bombay and two from Saurashtra constituted the Council with the Premier of Bombay as Chairman.

2. The question raised for the R.L.A's consideration is whether there is any constitutional or legal objection to the Government of Bombay agreeing to nominate its representatives on this Joint Advisory Council and, in particular,

whether it would be necessary to consult and take consent of the Bombay Legislature and the Cabinet, and whether the setting up of such Council would involve responsibility to the subjects of Saurashtra or conflict with the Cabinet's duty to Bombay.

3. Provision for inter-provincial co-operation, including Indian States, has been made by section 135 of the Government of India Act, which reads as follows:

"If at any time it appears to the Governor General that the public interest would be served by the establishment of an Inter-Provincial Council charged with the duty of --

- (a) inquiring into and advising upon disputes which may have arisen between Provinces;
- (b) investigating and discussing subjects in which some or all of the Provinces or the Dominion and one or more of the Provinces, have a common interest; or
- (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the Governor General to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

"An Order establishing such Council may make provision for representatives of Indian States to participate in the work of the Council."

4. It is apparent that the provisions of clauses (b) and (c) of this section have been copied in Article XV of the covenant. The Article, therefore, has in view a Council exactly of the same nature as that contemplated by section 135 of the Government of India Act. Each of the covenanting States was presumably an acceding State, and it is understood that the United State of Kathiawar would itself be an acceding State as one homogeneous unit. On that understanding, the provision for the inclusion of the United State of Kathiawar in an Inter-Provincial Council could have been made under the concluding part of section 135.

5. The Constitution Act having made specific provision for an Inter-Provincial Council (in upon which the United State of Kathiawar could have been represented) for

discharging functions identical with those described in Article IV, the question then arises whether the Joint Advisory Council can be validly set up under the covenant, and whether a Province can be a member of such Council. The Government of the Province must function within the framework of the Government of India Act, and so too must an acceding State to the extent to which its Instrument of Accession submits to the provisions of that Act. It is an established principle of constitutional limitations that where powers are conferred upon the Central Government, the exercise of the same powers by the constituent Governments is impliedly prohibited, wherever the intent of the grant to the Central Government would be defeated by such exercise. Compare Cooley's Constitutional Limitations, 8th edn. I, pp.64-65. The power to set up an Advisory Council is expressly conferred upon the Governor General by section 135 of the Government of India Act, and it is for the Governor General to define the nature of the duties to be performed by the Council and its organization and procedure. To accept the membership of a Council set up by a group of acceding States independently of the provisions of section 135 would be to derogate from the power which the Constitution Act has given to the Governor General alone, apparently as the executive head of the Central Government. It is true that the covenant of the United State of Kathiawar had the concurrence of the Government of India which also guarantees all its provisions, and it further appears that the Ministry of States, Government of India, is anxious to set up such a Council. However, in view of the express powers given by section 135, & all implied powers for the same purpose are excluded. The provisions of the Constitution Act which deal with the establishment of bodies with special functions must be strictly construed so as to exclude the setting up of

parallel bodies in any other manner. It is a well recognised rule which can be safely applied to the interpretation of constitutional statutes that, where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. Compare *Mazir Ahmed v. Emperor*, 38 Bombay Law Reporter p.987 at p. 993. The concurrence of the Government of India with the Articles of the covenant and even their guarantee cannot, therefore, override the provisions of section 135, and the Joint Advisory Council under the covenant cannot claim any constitutional validity.¶ Unless the Joint Advisory Council has constitutional validity, the difficulties in the way of its working would be very great indeed. The executive authority of the Province extends to the matters with respect to which the Legislature of the Province has power to make laws and it would seem from section 99 as recently adapted that the Provincial Legislature can have power to make laws only for the Province or for any part thereof. The Ministers chosen under section 51 of the Government of India Act have no authority to accept the membership of a Council which is not part of the constitutional machinery and neither they nor the Legislature would be competent to deal with any matter which is not confined only to the Province. Thus, for example, it would not ordinarily be competent to the Legislature to criticise or to pass any resolution regarding the decisions taken by the Ministry in Rajkot. The Inter-Provincial Council established under section 135 stands on a different footing. Any action taken by the Council set up under that section would have a binding force to the extent to which its duties are defined and the procedure outlined by the Governor General's order and, if the Governor General directs in the order that the Ministers of the Province should be members of the Council, they would, by such direction, be invested with the authority for that purpose; and similarly, since the duties of the Council

would have been constitutionally defined, it would be feasible for the Provincial Legislature to take suitable action thereupon, either by way of discussion or by way of implementing the recommendations, if necessary.

7. Some of the practical difficulties arising out of the establishment of the proposed Joint Advisory Council deserve notice. It is, in the first place, not quite clear by what authority and under what sanction the duties of the proposed Advisory Council are to be defined and its procedure laid down. The covenant speaks of Ministers of Kathiawar and Ministers of Bombay. It is not quite clear whether all the Ministers are to be members of the Council or, as proposed by the Government of Saurashtra and the Ministry of States, Government of India, two representatives of the Ministry are to be nominated on the Council. If the Ministry is to be represented on the Council by two representatives, the question will arise whether these representatives can bind the Minister in charge of the subject concerned even to the extent of making a recommendation. The scheme of the Government of India Act is that the Governor acts upon the advice of the Minister in charge of the subject so that it would be difficult for any other Minister without the prior concurrence of the Minister in charge of the subject to be a party to a recommendation made by the Council. Not only that, but inasmuch as the questions might affect the Province as a whole and its relations with Kathiawar, constitutional propriety requires that the decision for making a recommendation ought not ordinarily be taken except in exercise of the collective responsibility of the Cabinet. It is, therefore, doubtful whether two representatives of the Ministry can be given the wide power of binding the Cabinet in advance to any recommendation. Inconvenient situations may,

therefore, arise; if, for example, after Saurashtra takes any action on the faith of a joint recommendation to which a Bombay Minister was a party, the Bombay Cabinet or the Minister in charge is disinclined to endorse the recommendation. In the final analysis, the responsibility to the Legislature must remain unaffected, and the Legislature may refuse to implement the recommendations made by the Advisory Council. Even when the Legislature is inclined to implement them, it might be faced with this impediment that it has no power to legislate for any matter involving extra-territorial operation. It is precisely to get rid of all these difficulties that provision for an Advisory Council is made in section 135 which can be invested with wide duties and functions.

8. Having regard to the legal position and the difficulties explained above, the proposal to nominate representatives of the Government of Bombay on the Joint Advisory Council as provided for by the covenant is not free from constitutional objection.

3d/-P.M.L.
14/6
Remembrancer of Legal Affairs.

U.R. to P. and S.D., No. 303- Confl, dated the
15th June 1948.

BK3. 6/6/ 48.

Legal Department.

The proposal in this case is whether a cess can be levied on sugarcane crushed or consumed in sugar factories in the Province of Bombay. It is stated that such cess is levied under the Bihar Sugar Factories Control Act, 1937, and the rules made thereunder. It appears from notification issued under that Act the sugar factory areas in Bihar are declared local areas under the Act and a cess imposed on sugar cane entering such areas. It appears that the imposition of cess has been made under entry No. 49 in List II in the Seventh Schedule to the Government of India Act, 1935.

2. Entry No. 49 runs as follows:- "Cesses on the entry of goods into a local area for consumption, use or sale therein". The question therefore arises whether a factory can be legally declared to be a local area for the purposes of the said entry. The expression "local area" occurs in many legislative enactments and has to be given a meaning according to the context in which it is used. The meaning of the words used in entries in the Seventh Schedule to the Government of India Act has to be determined according to the legislative practice in vogue in India before the Constitution Act, 1935, was enacted. It is obvious that entry No. 49 relates to impositions of the nature of octroi. In the Scheduled Tax Rules made under section 60A of the Government of India Act, 1919, Schedule II provides that in the said Schedule the word 'tax' included a cess, rate, duty or fee and entry No. 8 which relates to terminal tax refers to the said tax as on goods imported or exported from a local area. It is clear that the expression "local area" in that entry referred to such area as a municipal or local authority area. It cannot mean a factory building. It is in this sense that the expression "local area" has been used in section 143 of the present Constitution Act. It would be absurd to

hold that a factory is a local area and that when sugarcane from the surrounding fields is brought into the factory buildings, that it enters a "local area". It is difficult to know what the geographical conditions in Bihar are. But from the plan relating to the Brihan Maharashtra Sugar Factory, which is in these papers, it appears that at least so far as the said factory is concerned, it is located in the midst of lands where sugarcane is grown. Such lands may belong to the proprietors of the factory or not. But it would appear that in the case of such factories there would be no entry of sugarcane into a local area and it would not therefore be permissible to impose a cess under entry No. 49 in List II in the Seventh Schedule. Really speaking a tax on sugarcane crushed in such factory will be a tax on sugarcane grown or consumed and will be in the nature of excise. The Central Government may be competent to impose such duty under entry No. 45 in List I in the Seventh Schedule.

Sd/-J.R.D.
30/6
tional Secretary to Government.

U.R. to F. D., No. 348 - Conf1, dated the
30th June 1948.

BKS. 6/6/ 48.

Office of the R.L.A.

The view expressed at 'A' on page 32 ante is correct (cf. proviso (c) of section 8(2) of the Indian Independence Act, 1947 and para.3(2) of the India (Provisional Constitution) Order, 1947).

Sd/-P.M.L.
21/7

Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 6851, dated the 22nd July 1948.

BKS. 6/6/ 48.

Office of the R.L.A.

As regards the question raised by the Chief Secretary at 'A' on page 100 ante, attention of P.& S.D. is invited to R.L.A.'s U.R. to P.& S.D. No.11566, dated the 3rd December 1947.

Sd/-P.M.L.

22/7

Remembrancer of Legal Affairs.

U.R. to P.& S.D., No. 6936 , dated the 24th July 1948.

BKS. 6/6/ 4c.

Office of the R.L.A.

Mr.D.K.Kunte has been appointed as Parliamentary Secretary to the Hon'ble Minister for Reconstruction in respect of the subject of requisitioning of accommodation which has been transferred to him from the Hon'ble Minister for Local Self Government. The Secretary, Health and Local Government Department, will, however, continue to be in charge of this work. The idea is that Mr.Kunte should do most of his work and put up cases to the Hon'ble Minister only where questions of policy are involved. The Chief Secretary remarks:

This arrangement is not however in conformity with the existing Rules of Business. If the power of disposal of cases is delegated by the Hon'ble Minister to the Parliamentary Secretary it may be possible for Mr.Kunte to dispose of certain cases; but then the papers will have to be put up to him by the Secretary of the Department. Will R.L.A. kindly examine the legal position, and until the Rules of Business are amended, suggest a way by which it would be possible for Mr. Kunte to relieve the Secretary of most of his work in connection with the requisitioning of accommodation.

1. The Chief Secretary seems to have assumed that by changing the Rules of Business, it is feasible for the Hon'ble Minister to delegate to the Parliamentary Secretary the work of disposal of certain cases. The points raised in the note of the Chief Secretary require the consideration of the constitutional position occupied by the Parliamentary Secretary in the system of administration.

3. The institution of Parliamentary Secretaries is apparently borrowed from the British system where they are treated

as holders of executive offices although they are appointed directly by the political chiefs or Boards under whom they act. See, Vol.6 pp.607 and 608 of Halsbury's Laws of England, 2nd Edition edn. It appears from the description of the various departments given in ~~xxx~~ Anson's Law and Custom of the Constitution Vol.II Part I that the manner of their appointment, their functions and duties are not uniform. In certain departments, the Parliamentary Secretary has received statutory recognition both in respect of his appointment and his duties. Thus, for example, the Parliamentary Secretary to the Board of Admiralty is appointed as part of the constitution which was settled by Order in Council of 10th August 1904; and by another Order in Council, the Parliamentary Secretary is to be responsible for the finance of the Department and for ~~the~~ such other business of the admiralty as may be from time to time assigned to him. A Parliamentary Secretary for the Ministry of Agriculture and Fisheries was authorized in the year 1909 by 9 Edw.VII ch.15. But even in England the position is not clear and as observe by Sir Roger Lumley in a minute which was prepared on 19th November 1937, the varying practice in England provides no uniform precedent which can be followed.

4. Sir Roger Lumley however pointed out that it should be possible to pick out from the wide and varying field of

experience certain essential elements which might ~~xxx~~ well form the basis on which a sound practice might be built up. After considerable ~~discussion~~ discussion, a note was prepared in which some of the important conclusions arrived at were recorded. So far as the present question is concerned, para (1) ~~x~~ to (3) and (6) are important and may for the sake of the facility of reference be reproduced. They are:-

"(1) The duties of Parliamentary Secretaries are essentially parliamentary, i.e. their prime function is to assist Honourable Ministers in their Parliamentary duties. What actual part they should take in any given debate must depend on the instructions of their Honourable Ministers but whenever they speak they will be speaking on ~~behalf~~ behalf of Government. Ordinarily it will be desirable that they should be appointed on Select Committees.

(2) In order that they may fit themselves to speak on behalf of Government they must be acquainted with the policy of Government in ~~their~~ their department and with the details of the administration of that policy. For this purpose ordinarily all cases relating to the subject with which the Parliamentary Secretary is concerned should be seen by the Parliamentary Secretary after the Minister has passed orders, and before a case (if it is required to do so) goes on to the H.P.M. and H.E. But this rule must be subject to exception in urgent cases, and on occasions when the P.S. is absent from Headquarters. Cases must then go direct to the Department and be seen afterwards by the Parliamentary Secretary. Secret and confidential papers will not go to the Parliamentary Secretary.

(3) Conditions vary so much in different departments that there need not be any uniformity in the status or functions of Parliamentary Secretaries. The extent to which the services of a Parliamentary Secretary can be utilised in noting on files before submission to the Honourable Minister must depend on the personal relations between a Parliamentary Secretary and his H.M. As an ordinary procedure it would be open to much objection as duplicating ~~xxx~~ work and creating too much delay. In cases in which the H.M. desires to have the views of the Parliamentary Secretary ~~it~~ it might save time for the Secretary ~~xx~~ of the Department and the Parliamentary Secretary to discuss the subject

before the P.S. notes.

- (6) While a Parliamentary has no right to see secret and confidential files it was agreed that, when an H.M. gives special or general instructions to this effect, a P.S. shall have access to such information and such Secretariat files other than confidential relating to any case he is dealing with as he may call for."

5. The constitutional position in India is very different from that in England, both in respect of appointments and in respect of the duties of Parliamentary Secretaries. In the first place, the institution of Parliamentary Secretaries is unknown to the Constitution Act or to any other statute (excepting Bombay Act I of 1937). The Constitution Act makes provision only for a Council of Ministers as part of the administration of Provincial affairs. Under section 50, there shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions. The whole theory of the Constitution Act as embodied in this section is that the Governor must act upon the advice of his Ministers. Parliamentary Secretaries are not Ministers. They do not take the oath of office including the oath of secrecy. It is, therefore, obvious that it would be contrary to the Constitution Act that the Governor should act upon the advice of some one else in the discharge of his functions; and, therefore, it follows that a Parliamentary Secretary cannot tender advice to the Governor. That position was clearly recognized by

Sir Roger Lumley who wrote that "Ministers and Ministers alone are responsible for their Departments, and that responsibility cannot be delegated to or shared with any junior Minister. Not only is this necessary to safeguard the pre-eminent position of Ministers, but any other doctrine would be at variance with the Government of India Act which makes it clear that Ministers alone can advise the Governor. The Governor could not, therefore, be advised on a departmental file or otherwise by a Parliamentary Secretary, and all advice must come through his responsible Minister." It would not, therefore, be constitutionally feasible that the Parliamentary Secretary should do most of the work of the Minister and put up to the Minister only such cases where questions of policy are involved.

6. That would lead to special difficulties in the work of requisitioning. The Bombayland Requisition Act, 1948, requires the Provincial Government to discharge certain functions and duties. By "Provincial Government" we mean the ~~Executive~~ Governor acting on the advice of his Minister. The orders of requisitioning are constantly being challenged in Courts of law; and it would be a valid ground of challenge to urge that any particular order of requisitioning or any particular act purporting to be performed by the Provincial Government was not made or performed by the Governor acting on the advice of his Minister, but

was made or performed by the Governor acting on the advice of a Parliamentary Secretary. Moreover, in practice, it would be very difficult indeed to define the border-line between cases in general and cases involving policy. Thus, for example, section 5 of the Bombay Land Requisition Act, 1948, expects the Provincial Government to form an opinion that an order of requisition is necessary or expedient. In most cases, that opinion would depend upon a question of policy, unless broad categories where requisition orders are to be made as a matter of routine are first defined by the Minister.

7. The only other method of investing a Parliamentary Secretary with authority to discharge executive duties is by amending the Rules of Business as suggested by the Chief Secretary. Under section 59(3), the Governor can make rules for the more convenient transaction of the business of the Provincial Government and for the allocation among Ministers of the said business. Under section 49, the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor either directly or through officers sub-ordinate to him. It is in virtue of this section that it would be possible for the Governor, of course on the advice of his Minister, to make rules providing that certain business shall be disposed of at the level of the permanent departmental Secretary, who is an officer subordinate to him. A rule authorizing Parliamentary Secretaries to

dispose of executive business can be made only if they are ~~not~~ held to be officers subordinate to the Governor. The expression "officers subordinate to the Governor" has nowhere been defined in the Constitution Act. By "officer" we mean one who holds an ~~an~~ office. Officers subordinate to the Governor fall into two broad divisions namely, (1) those for whom specific provision is made in the Act itself such as the Advocate General or the Ministers themselves and (2) those who either are members of the Civil Service of the Crown in India or hold any civil post under the Crown in India. Section 240(1) thus provides that except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India or holds a civil post under the Crown in India holds office during His Majesty's pleasure. As said before, Parliamentary Secretaries do not fall in the first category as Ministers do. Ministers were held to be officers subordinate to the Governor in the case of *Emperor v. Sibnath Banerji*, 48 Bombay Law Reporter (P.C.) p.1 on the ground that while a Minister may have duties to the Legislature, the provisions of section 51 as to the appointment, payment and dismissal of Ministers and sections 59(3) and (4) of the Act of 1935 and the Business Rules made by virtue of section 59 place beyond doubt that the Minister is an officer subordinate to the Governor. Attention is specially invited to the wording of section 51(1) which is in the following terms:-

(1), The Governor's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure.

Parliamentary Secretaries are obviously not members of a civil service. They cannot also be said to hold any civil posts under the Crown in India. It may be that they hold offices of profit under the Crown in India, as is conceded by Bombay Act I of 1937, namely, as is conceded by Bombay Act I of 1937, namely, the Bombay Legislature Members (Removal of Disqualifications) Act, 1937. But an office of profit under the Crown is not the same thing as a civil post under the Crown. The holder of a civil post under the Crown is governed by section 241 which provides that appointments to the civil posts are to be made by the Governor in the case of posts in connection with the affairs of the Province. It seems that the G.O.s. issued from time to time appointing Parliamentary Secretaries purport to be issued by order of the Governor of Bombay, although the understanding always has been that the Prime Minister appoints Parliamentary Secretaries and not the Governor. Under sub-section (2) of section 241, the conditions of service of persons serving His Majesty in a civil capacity can be prescribed. The expression "serving His Majesty in a civil capacity" includes both members of the civil service and holders of civil posts, and they all come under the broad category of "civil services" which is the heading of Chapter II in which this section occurs. It cannot be maintained that Parliamentary Secretaries are holders of civil posts or serve the Crown in a Civil capacity in the sense contemplated by this Chapter; and we have all along held that they are not Government servants to

whom the Bombay Civil Services (Conduct, Discipline and Appeal) Rules apply. Compare my opinion No.4168 dated 6th May 1947 and H.L.A's previous opinions No.6531 dated 6-12-1937 and No.6556 dated 7-12-1937. Attention is in particular invited to the Government of India letter of 4-5-1937 referred to therein from which it will be seen that the Government of India held that Parliamentary Secretaries do not hold appointments or posts within the meaning of the Government of India Act and that they are outside the organisation, strength and cadres of services within the Province. Generally speaking Parliamentary Secretaries may be said to hold a political office. They are appointed and resign with the party in power. As stated above, they do not take an oath of office or secrecy. The political character of their office is emphasized in the note quoted above; and it would be difficult to hold that they are subordinate to the Governor while filling such office. In my opinion, therefore, Parliamentary Secretaries cannot be held to be officers subordinate to the Governor, and it would not, therefore, seem constitutionally feasible for the Governor to exercise his executive authority through them even by amending the Rules of Business made under section 59. In fact, Sir Roger Lumley had perhaps this difficulty in mind when he said that a Parliamentary Secretary should not be assigned the functions of officials particularly the Secretary of the Department; and one of the reasons

he gave was that the Secretary's position is statutorily recognized, and his duties are further defined by the Rules of Business. What Sir Roger Lumley had in view was perhaps the enactment called the Secretaries to Government Act, which was passed as far back as 1834 to avoid difficulties which may arise in cases of statutory orders which are to be passed in the name of the Provincial Government and which are likely to come under the scrutiny of Courts. For similar reasons rule 12 of the Business Rules made under section 59 of the present Government of India Act empowers certain officers to sign orders or ~~instruments~~ instruments on behalf of Governor. Courts have refused to recognise orders when they were not signed by officers properly authorized.

8. These are some of the constitutional difficulties in the way of a Parliamentary Secretary doing the work of a Minister in respect of requisitioning or relieving the departmental Secretary of his work.

9. For the same reason for which it has been held that they are not officers subordinate to the Governor, it must be said that delegation under section 15 of the Bombay Land Requisition Act would not be possible in the case of Parliamentary Secretaries.

10. The only method I can think of achieving the desired object is that the papers should be submitted to the Minister through the Parliamentary Secretary as a matter of convention, and the Minister may sign on the faith of the Parliamentary Secretary, if he is so disposed; but it must be understood that the responsibility must always be that of the Minister; and final orders must be authenticated as provided in the Rules of Business.

Signed by R.L.A.

Remembrancer of Legal Affairs.

X 350, Conf., dated , 1st July 1948.

M.D. Bhat , Esq. I.C.S.

C.S. to the Govt. of Bombay.

Office of the R.L.A.

Mr. D. K. Kunte has been appointed as Parliamentary Secretary to the Hon'ble Minister for Reconstruction in respect of the subject of requisitioning of accommodation which has been transferred to him from the Hon'ble Minister for Local Self Government. The Secretary, Health and Local Government Department, will, however, continue to be in charge of this work. The idea is that Mr. Kunte should do most of his work and put up cases to the Hon'ble Minister only where questions of policy are involved. The Chief Secretary remarks :

"This arrangement is not however in conformity with the existing Rules of Business. If the power of disposal of cases is delegated by the Hon'ble Minister to the Parliamentary Secretary, it may be possible for Mr. Kunte to dispose of certain cases; but then the papers will have to be put up to him by the Secretary of the Department. Will R.L.A. kindly examine the legal position, and until the Rules of Business are amended, suggest a way by which it would be possible for Mr. Kunte to relieve the Secretary of most of his work in connection with the requisitioning of accommodation."

2. The Chief Secretary seems to have assumed that by changing the Rules of Business it is feasible for the Hon'ble Minister to delegate to the Parliamentary Secretary the work of disposal of certain cases. The points raised in the note of the Chief Secretary require the consideration of the constitutional position occupied by the Parliamentary Secretary in the system of administration.

3. The institution of Parliamentary Secretaries is apparently borrowed from the British system where they are treated as holders of executive offices although they

are appointed directly by the political chiefs or Boards under whom they act. See Vol.6 pp.607 and 608 of Halsbury's Laws of England, 2nd Hailsham edn. It appears from the description of the various departments given in Anson's Law and Custom of the Constitution Vol.II Part I that the manner of their appointment, their functions and duties are not uniform. In certain departments, the Parliamentary Secretary has received statutory recognition both in respect of his appointment and his duties. Thus, for example, the Parliamentary Secretary to the Board of Admiralty is appointed as part of the constitution which was settled by Order in Council of 10th August 1904; and by another Order in Council, the Parliamentary Secretary is to be responsible for the finance of the Department and for such other business of the admiralty as may be from time to time assigned to him. A Parliamentary Secretary for the Ministry of Agriculture and Fisheries was authorized in the year 1909 by 9 Edw. VII ch.15. But even in England the position is not clear and as observed by Sir Roger Lumley in a minute which was prepared on 19th November 1937, the varying practice in England provides no uniform precedent which can be followed.

4. Sir Roger Lumley, however, pointed out that it should be possible to pick out from the wide and varying field of experience certain essential elements which might well form the basis on which a sound practice might be built up. After considerable discussion, a note was prepared in which some of the important conclusions arrived at were recorded. So far as the present question is concerned, BKS, 6/6/ 4e.

paras (1) to (3) and (5) are important and may for the sake of the facility of reference be reproduced. They are:-

"(1) The duties of Parliamentary Secretaries are essentially parliamentary, i.e. their prime function is to assist Honourable Ministers in their Parliamentary duties. What actual part they should take in any given debate must depend on the instructions of their Honourable Ministers but whenever they speak they will be speaking on behalf of Government. Ordinarily it will be desirable that they should be appointed on Select Committees.

(2) In order that they may fit themselves to speak on behalf of Government they must be acquainted with the policy of Government in their department and with the details of the administration of that policy. For this purpose ordinarily all cases relating to the subject with which the ~~Parliamentary~~ Parliamentary Secretary is concerned should be seen by the Parliamentary Secretary after the Minister has passed orders, and before a case (if it is required to do so) goes on to the H.P.M. and H.B. But this rule must be subject to exception in urgent cases, and on occasions when the P.S. is absent from Headquarters. Cases must then go direct to the Department and be seen afterwards by the Parliamentary Secretary. Secret and confidential papers will not go to the Parliamentary Secretary.

(3) Conditions vary so much in different departments that there need not be any uniformity in the status or functions of Parliamentary Secretaries. The extent to which the services of a Parliamentary Secretary can be utilised in noting on files before submission to the Honourable Minister must depend on the personal relations between a Parliamentary Secretary and his H.M. As an ordinary procedure it would be open to much objection as duplicating work and creating too much delay. In cases in which the H.M. desires to have the views of the Parliamentary Secretary it might save time for the Secretary of the Department and the Parliamentary Secretary to discuss the subject before the P.S. notes.

(6) While a Parliamentary has no right to see secret and confidential files it was agreed that, when an H.M. gives special or general instructions to this effect, a P.S. shall have access to such information and such Secretariat files other than confidential relating to any case he is dealing with as he may call for."

is very different from that in England, both in respect of appointments and in respect of the duties of Parliamentary Secretaries. In the first place, the institution of Parliamentary Secretaries is unknown to the Constitution Act or to any other statute (excepting Bombay Act I of 1937). The Constitution Act makes provision only for a Council of Ministers as part of the administration of Provincial affairs. Under section 50, there shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions. The whole theory of the Constitution Act as embodied in this section is that the Governor must act upon the advice of his Ministers. Parliamentary Secretaries are not Ministers. They do not take the oath of office including the oath of secrecy. It is, therefore, obvious that it would be contrary to the Constitution Act that the Governor should act upon the advice of some one else in the discharge of his functions; and, therefore, it follows that a Parliamentary Secretary cannot tender advice to the Governor. That position was clearly recognized by Sir Roger Lumley who wrote that "Ministers and Ministers alone are responsible for their Departments, and that responsibility cannot be delegated to or shared with any junior Minister. Not only is this necessary to safeguard the pre-eminent position of Ministers, but any other doctrine would be at variance with the Government of India Act which

BKS. 6/6/ 4c.

makes it clear that Ministers alone can advise the Governor. The Governor could not, therefore, be advised on a departmental file or otherwise by a Parliamentary Secretary, and all advice must come through his responsible Minister." It would not, therefore, be constitutionally feasible that the Parliamentary Secretary should do most of the work of the Minister and put up to the Minister only such cases where questions of policy are involved.

6. That would lead to special difficulties in the work of requisitioning. The Bombay Land Requisition Act, 1948, requires the Provincial Government to discharge certain functions and duties. By "Provincial Government" we mean the Governor acting on the advice of his Minister. The orders of requisitioning are constantly being challenged in Courts of law, and it would be a valid ground of challenge to urge that any particular order of requisitioning or any particular act purporting to be performed by the Provincial Government was not made or performed by the Governor acting on the advice of his Minister, but was made or performed by the Governor acting on the advice of a Parliamentary Secretary. Moreover, in practice, it would be very difficult indeed to define the border-line between cases in general, and cases involving policy. Thus, for example, section 5 of the Bombay Land Requisition Act, 1948, expects the Provincial Government to form an opinion that an order of requisition is necessary or expedient. In most cases, that opinion would depend upon

a question of policy, unless broad categories where requisition orders are to be made as a matter of routine are first defined by the Minister.

7. The only other method of investing a Parliamentary Secretary with authority to discharge executive duties is by amending the R Rules of Business as suggested by the Chief Secretary. Under section 59(3), the Governor can make rules for the more convenient transaction of the business of the Provincial Government and for the allocation among Ministers of the said business. Under section 49, the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him. It is in virtue of this section that it would be possible for the Governor, of course on the advice of his Minister, to make rules providing that certain business shall be disposed of at the level of the permanent departmental Secretary, who is an officer subordinate to him. A rule authorising Parliamentary Secretaries to dispose of executive business can be made only if they are held to be officers subordinate to the Governor. The expression "officers subordinate to the Governor" has nowhere been defined in the Constitution Act. By "officer" we mean one who holds an office. Officers subordinate to the Governor fall into two broad divisions, namely, (1) those for whom specific provision is made in the Act itself such as the Advocate General

BKS. 6/6/ 40.

or the Ministers themselves and (2) those who either are members of the Civil Service of the Crown in India or hold any civil post under the Crown in India. Section 240(1) thus provides that except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India or holds a civil post under the Crown in India holds office during His Majesty's pleasure. As said before, Parliamentary Secretaries do not fall in the first category as Ministers do. Ministers were held to be officers subordinate to the Governor in the case of *Emperor v. Sibnath Banerji*, 48 Bombay Law Reporter (P. C.) p.1 on the ground that while a Minister may have duties to the Legislature, the provisions of section 51 as to the appointment, payment and dismissal of Ministers and sections 59(3) and (4) of the Act of 1935 and the Business Rules made by a virtue of section 59 place beyond doubt that the Minister is an officer subordinate to the Governor. Attention is specially invited to the wording of section 51⁽¹⁾ which is in the following terms :-

(1) The Governor's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure.

Parliamentary Secretaries are obviously not members of a civil service. They cannot also be said to hold any civil post under the Crown in India. It may be that they hold offices of profit under the Crown in India, as is conceded by Bombay Act I
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of 1937, namely, the Bombay Legislature Members (Removal of Disqualifications) Act, 1937. But an office of profit under the Crown is not the same thing as a civil post under the Crown. The holder of a civil post under the Crown is governed by section 241 which provides that appointments to the civil posts are to be made by the Governor in the case of posts in connection with the affairs of the Province. It seems that the C.Rs. issued from time to time appointing Parliamentary Secretaries purport to be issued by order of the Governor of Bombay, although the understanding always has been that the Prime Minister appoints Parliamentary Secretaries and not the Governor. Under sub-section (2) of section 241, the conditions of service of persons serving His Majesty in a civil capacity" includes both members of the civil service and holders of civil posts, and they all come under the broad category of "civil services" which is the heading of Chapter II in which this section occurs. It cannot be maintained that Parliamentary Secretaries are holders of civil posts or serve the Crown in a civil capacity in the sense contemplated by this Chapter; and we have all along held that they are not Government servants to whom the Bombay Civil Services (Conduct, Discipline and Appeal) Rules apply. Compare my opinion No.4618 dated 6th May 1947. A Generally speaking Parliamentary Secretaries may be said to hold a political office. They are appointed and resign with the party in power. As stated above they do

not take an oath of office or secrecy. The political character of their office is emphasized in the note quoted above; and it would be difficult to hold that they are subordinate to the Governor while filling such office. In my opinion, therefore, Parliamentary Secretaries cannot be held to be officers subordinate for the Governor to exercise his executive authority through them even by amending the Rules of Business made under section 59. In fact, Sir Roger Lumley had perhaps this difficulty in mind when he said that a Parliamentary Secretary should not be assigned the functions of officials particularly the Secretary of the Department; and one of the reasons he gave was that the Secretary's position is statutorily recognized and his duties are further defined by the Rules of Business. What Sir Roger Lumley had in view was perhaps the enactment called the Secretaries to Government Act, which was passed as far back as 1834 to avoid difficulties which may arise in cases of statutory orders which are to be passed in the name of the Provincial Government and which are likely to come under the scrutiny of Courts. For similar reasons rule 12 of the Business Rules made under section 59 of the present Government of India Act empowers certain officers to sign orders or instruments

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on behalf of Governor. Courts have refused to recognize orders when they were not signed by officers properly authorized.

8. These are some of the constitutional difficulties in the way of a Parliamentary Secretary doing the work of a Minister in respect of requisitioning or relieving the departmental Secretary of his work.

9. For the same reason for which it has been held that they are not officers subordinate to the Governor, it must be said that delegation under section 15 of the Bombay Land Requisition Act would not be possible in the case of Parliamentary Secretaries.

10. The only method I can think of achieving the desired object is that the papers should be submitted to the Minister through the Parliamentary Secretary as a matter of convention, and the Minister may sign on the faith of the Parliamentary Secretary, if he is so disposed; but it must be understood that the responsibility must always be that of the Minister; and final orders must be authenticated as provided in the Rules of Business..

Id/- C.K. Daphtary.
25/6/48

Remembrancer of Legal Affairs.

BKS. 6/6/ 4c.

Office of the R.L.A.

In continuation of R.L.A.'s U.R. No.350-Conf1, dated the 1st July 1948, the fair copy of the opinion received from the Advocate General duly countersigned in token of his acceptance is forwarded herewith. It may please be returned after perusal.

It may here be noted that in my opinion sent on 1-7-48 I had added the following at 'A' on p.9 giving reference to previous opinions:-

"and R.L.A.'s previous opinions No.6531 dated 6-12-1937 and No.6556 dated 7-12-1937 Attention is in particular invited to the Government of India letter of 4-5-1937 referred to therein from which it will be seen that the Government of India held that Parliamentary Secretaries do not hold appointments or posts within the meaning of the Government of India Act and that they are outside the organisation, and strength and cadres of services within the Province."

Remembrancer of Legal Affairs.

U.R. to Chief Secretary , No.356 -Conf1.,

dated the 3rd July 1948.

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Legal Department.

The question for consideration is whether it is legally feasible to make provision for appointment of a Minister on a statutory Housing Corporation.

2. Like the Australian and Canadian constitutions, the Constitution Act of India specifically provides for the establishment of a Council of Ministers. Section 50 of the Government of India Act, 1935, provides that there shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions. Section 51 of the Act provides that Governor's Ministers shall be chosen and summoned by him, shall be sworn as members of the Council, and shall hold office during his pleasure. That section further provides for the salaries of Ministers. It will be seen from these provisions that the Constitution Act has laid down the duties which the Ministers have to perform under the Act. They are to aid and advise the Governor in the exercise of his functions. The Council of Ministers is a creation of the statute and as such the Ministers cannot exercise powers and perform duties beyond those laid down in the statute itself. It will, therefore, be reasonable to hold that a Legislature which derives its power from the Government of India Act cannot impose by law any functions on a Minister which are outside those laid down by the Act. In the Canadian and Australian constitutions, there are similar provisions regarding the establishment of Councils of Ministers to aid and advise the Government of Canada and the Government of the Commonwealth of Australia. But it does not appear that in any law made under those constitutions there is any provision imposing statutory functions on a Minister.

3. In England there is no written constitution as there is for the Dominions of India, Canada, and

Australia. But even in that Country, care seems to have been taken not to appoint a Minister on any statutory Board. Recently for the purpose of nationalizing coal mining industry, England has passed the Coal Industry Nationalisation Act, 1946. But even in that Act, no provision is made for the appointment of a Minister on the National Coal Board constituted under the Act. On the other hand in the Bank of England Act, it is specifically provided that no Minister shall be the Director of the Bank. The principle is well stated in May's Parliamentary Practice (p. 206, 14th edition.).

"There are a number of recent statutes which set up public authorities such as the Central Electricity Board, the Unemployment Board, the Traffic Commissioners and the London Passenger Transport Board. The disqualification of the holders of these offices is normally expressly provided for in the statutes under which they are constituted, usually in the indirect form that they are disqualified for office so long as they are Members of Parliament. These provisions are clearly intended to secure conformity with the conditions of parliamentary government. Although these public authorities are so constituted as to be free in respect of their day-to-day administration from political and ministerial control, yet some minister is in the last resort responsible for them to Parliament. It would seriously impair ministerial responsibility if the members of these boards could sit in the House of Commons; nor could they retain their posts on a change of Government, involving a change of party, if they had seats in the House of Commons."

4. During the debate on the Ministers Salaries Bill in 1937 the Hon'ble the Premier quoted the following observations of the Chancellor of the Exchequer which are pertinent.

"I would recall to the House that the proposition which has been reaffirmed again and again goes back to the time of Sir Henry Campbell Bannerman. The last time it was raised was in December 1935 when Sir Stanley Baldwin said :

'As regards directorship, the rule laid down by Sir Henry Campbell Bannerman in answer to a question on 20th March 1936, was in the following words :

"The condition laid down on the formation of Government was that all directorships must be resigned except in the case of honorary directorships, directorships in connection with philanthropic undertakings and directorships in private companies".

These principles are I think fairly easy to explain and I should certainly include three. In the first place it is plain that in no circumstances must a man who holds the position of a Minister ever allow himself to be in such a situation that his public duty would conflict with his private interests. That is a principle

which we should all affirm and honestly try to observe but it is of immense importance in the case of Ministers because they have exceptional means of information. The second principle is that no man should allow himself to occupy any portion of the time which he is bound to devote to his public duties and pursue any private interest whatever, whether it is in playing golf or in the nature of business.

The third principle is that inasmuch as the secrets of Government are specially in charge of Cabinet Ministers, no Minister and particularly a Cabinet Minister must in any circumstances put himself in a position where he is not able to be the complete guardian of those secrets without any possibility of any private interests being served through a knowledge of those secrets."

After quoting the above observations of Sir Campbell

Bannerman Hon'ble the Premier added :

"These were the very honourable and high principles that were laid down at the time when an exact question, almost an ~~identical~~ identical question, was raised in the House of Commons. It was answered as follows, by the Chancellor of the Exchequer :

"I am convinced that these matters are to be determined not by an explicit and precise list of negatives but by saying that all honourable men are to be trusted in the discharge of their public duties. If they act dishonourably, there is no country where they will be more certain to be found out than in this country."

I wish to state that this applies equally to our country. We propose to follow here these noble principles governing such matters followed by Cabinet Ministers in England where also there is no statutory restriction in these matters.

5. For the above reasons the proposal for the appointment of Ministers on statutory Corporations will not be feasible.

Sd/-J.R.D. 6/7
Additional Secretary to Government.

H.M. *Robert* No. 6305 ,dated the 6th July 1948.

BKS. 7/6/ 48.

Office of the R.L.A.

Para. A (1) on p. 225.- Section 68 of the Government of India Act, 1935, empowers the Governor to promulgate such Ordinances as the circumstances appear to him to require when the Legislature of the Province is not in session and he is satisfied that circumstances exist which render it necessary for him to take immediate action. The question is one of satisfaction of the Governor and in view of the rulings of the Federal Court and the Privy Council, it will be necessary to submit all cases regarding the issue of Ordinances to the Governor before issue of Ordinances.

2. Para. A(11) on p. 225.- The view that the Ministry would originate the message if it desired to invoke the Governor's power under section 63 (2) of the Government of India Act, 1935, is correct, as the rights of the Governor under that section will be exercised by him on the advice of the Honourable Ministers. The power of the Governor to summon a joint sitting for the purpose of deliberating and voting on a Bill under section 74 (2) will also be exercised by him on the advice of the Honourable Ministers.

Section 75 of the Government of India Act, 1935, provides for assent to Bills. Under that section every Bill on being passed by both the Chambers of the Provincial Legislature has to be presented to the Governor and the Governor has either to assent to ^{the} Bill or withhold assent therefrom or reserve the Bill for the consideration of the Governor General. Every Bill on being passed by the two Chambers and authenticated by the Speaker is forwarded to His Excellency

by the Legal Department for the assent of the Governor or the Governor General, as the case may be.

As regards sanctions and recommendations to Bills, the Legal Department while furnishing a final draft of Bills to Departments point out the sanctions required to the Bill (vide Instruction 23 (6) of the Instructions issued under Rules of Business); and under Instruction 24 (2), the Administrative Department has to obtain the sanction of the Governor to the Bill or any amendment thereto. Recommendation of the Governor under section 82 is also similarly obtained by the Administrative Department concerned and recommendation of the Governor to a demand for grant under section 79 (3) is obtained by the Finance Department. The Governor however, now exercises all these powers with the aid and advice of the Honourable Ministers.

Legislative powers of the Governor are those set out in section 68 of the Government of India Act, 1935. These are also exercised by him on the advice of the Honourable Ministers.

3. Para. A (iii) and (iv) on p. 226. As regards the summoning and proroguing of the Legislative Legislature, and making of rules by the High Court under section 224 of the Government of India Act, 1935, the view expressed by the Political and Services Department is correct.

4. As regards para. B, this Department has no remarks to offer.

Sd/-P.M.L.
Remembrancer of Legal Affairs.

No. 7257

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 2nd August 1948.

From

P.K. Lad, Esquire, I.C.S.,
Remembrancer of Legal Affairs.

To

The Post Master - General,
Bombay Circle, Bombay.

Subject :- Prosecution of Mr. Kapse
(Ex - Postman).

Sir,

With reference to your letter No. L.M.385/3,
dated the 14th May 1948 and the subsequent correspon-
dence on the subject noted above, I have the honour
to forward herewith my opinion in the matter.

Yours faithfully,

Sd/-P.M.L.

31/7

Remembrancer of Legal Affairs.

Enclosure : Subd. for signature.

Opinion .

A.L.R. Sd/-R.T.K. 31/7

R.L.A.

BKS. 7/6/ 40.

Sanction to
prosecute.

Government
of India Act,
1935, sec. 270
(now repealed).

It appears that a criminal case against Mr. Kapse, a postman, was committed to the Sessions Court, Bharwar, under sections 409, 467 and 471 of the Indian Penal Code, but on a reference to the High Court by the Session Judge, the High Court quashed the order of commitment on the ground that the prosecution under sections 467 and 471 required sanction of the Governor-General under section 270 of the Government of India Act, 1935.

By the India (Provisional Constitution) Order, 1947, section 270 has been omitted. It appears that the Magistrate holds the view that sanction is still necessary as the offence was committed when sanction was required but he is also of opinion that sanction may not be necessary if a fresh complaint is filed. The Public Prosecutor and the Police are of the opinion that sanction is not now necessary and a fresh complaint is not possible as only committal proceedings have been quashed.

The questions that arise for R.L.A.'s consideration are :

(a) Whether a fresh complaint is now necessary,
and

(b) If so, whether, sanction of the Governor-General under section 270 (now repealed) would be required before the complaint is filed.

In the absence of any directions by the High Court while quashing the commitment, the primary effect of the order is to supersede the action taken by the Magistrate and ordinarily he would have to go back to the point at which he took cognizance of the case on complaint in or upon Police report and ordinarily no fresh complaint is necessary (cf. *Emperor vs. Girish-chandra Kundu* 57 Cal. 1042 at p. 1060).

In the present case, however, proceedings were instituted without sanction and therefore they were void ab initio. Section 270 of the Government of India Act, 1935 enacts :-

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion."

In interpreting this section Suleman J. observed in *Mori Ram Singh v. Crown* (1939 F.L.J. 153):

"Section 270(1) directs that no proceedings, civil or criminal shall be instituted etc. The prohibition is against the institution itself and its applicability must, therefore, be judged in the first instance at the earliest stage of the institution. If the prosecution case as disclosed by the complaint or the Police report, as the case may be, shows that the act purported to be done in execution of duty, the proceedings must be dropped."

In *Arjan Singh v. The Crown*, I.L.R. 1940 Lah. 102, Blacker J. observed :

"There appears to me to be a fundamental difference between the two sections (i.e. section 270 and section 197, Criminal Procedure Code). Section 270 creates a bar to the "institution" of proceedings that is to say, to the act of a complainant making a complaint or of a police officer making a report as well as to the Act of a Magistrate taking cognizance upon such complaint or report."

Reaffirming this interpretation, in a recent judgement in *Suraj Parkash v. The King Emperor*, 1945 F.L.J. 44, Spens C.J. observed :

"We would however take this opportunity of saying that in cases to which section 270 of the Constitution Act applies, the words of the section in our view require that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained."

It is obvious, therefore, that the proceedings taken against Mr. Kapur are wholly void and new proceedings will have to be started. It appears that the Magistrate had originally taken cognizance of

the case on a Police report. If so, the Police may be instructed to submit a fresh charge sheet in the matter, as the one which they had sent up earlier was void for want of sanction.

The next question that arises is whether sanction under section 270 of the Government of India Act, 1935 would be necessary before sending up a fresh charge sheet. The bar created by section 270 was only a procedural bar and it came into play only when the proceedings were instituted. The accused cannot claim that privilege hereafter in respect of any fresh institution, as the bar is no longer an impediment. Consequently with the omission of section 270, no sanction would now be necessary for the prosecution of the accused (cf. *Gafur Daud Sahab, In re.* 26 Bom. L.R. 1235).

Sd/-P.M.L.
Remembrancer of Legal Affairs.

BKS. 7/6/ 4c.

Legal Department.

The question for consideration in this case is whether appointments of the members of the Public Service Commission made for a period of 5 years by Regulation No. 5 of the Bombay Public Service Commission (Conditions of Service) Regulations issued by P. and S.D. Notification No. 1617/34-II, dated 1st August 1947 can be altered to period of 3 years. It is no doubt true that the Regulations made by H.E. the Governor on 1st August 1947 can remain in force after 15th August 1947 and can now be amended. The rules were originally made by H.E. the Governor in his discretion. After 15th August 1947 the distinction between the exercise of the powers of the Governor in his discretion and with the aid and advice of Ministers no doubt disappears and the Governor has now to exercise these powers with the aid of the Ministers. To provide now that the period of the office of the present incumbents shall be for 3 years will amount to giving a retrospective effect to the proposal. In strict law, it is no doubt true that in the case of an office created by a Statute, the incumbent has no vested rights which can survive the abolition of the Statute (*Bailey v. The King* (1934) A.C. p. 178). The same principle will apply where the conditions of an office are fixed by statutory regulations and are afterwards altered by a change in those regulations. The regulations made under section 265 of the Government of India Act, 1935 are statutory and create rights in the incumbents who were appointed thereunder. The alteration of the regulations curtailing the period of their office from 5 to 3 years affects the said rights and would have ordinarily entitled them to claim compensation. Moreover section 265 of the Government of India Act, subjects the incumbents to a statutory restriction debarring them from being appointed to any other office under the Crown in India. This circumstance has to be taken

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into consideration if the period of office of the ~~holder~~ holders is to be curtailed from 5 to 3 years and if the new rule is to apply to the present incumbents. Although, therefore, there is no legal objection to amend the regulations made on 1st August 1947 the question whether the new rule should apply to the present incumbents requires consideration.

Sd/-P.M.L.

R.L.A.

Secretary to Government.

U.R. to P. and S.D., No. 7596 , dated the

11th August 1948.

BKS. 7/6/ 4c.

Office of the R.L.A.

Rule 12 of the Rules of Business made under section 59 of the Government of India Act, 1935, provides that save in cases where an officer has been specially empowered to sign an order or instrument of the Government of Bombay every such order or instrument shall be signed by either the Secretary, the Joint Secretary, the Deputy Secretary, the Under Secretary or the Assistant Secretary to the Government of Bombay and such signatures shall be deemed to be the proper authentication of such order or instrument. An Additional Assistant Secretary is of the same status as an Assistant Secretary, and, therefore, an Additional Assistant Secretary will be also an Assistant Secretary within the meaning of rule 12 of the Rules of Business. See paragraph 4 of R.L.A.'s opinion No.3972, dated 12th May 1942. The Additional Assistant Secretary was, therefore, competent to sign the order in question. It was not necessary to specially empower him to sign the order.

2. With reference to paragraph 3 of his letter at pp.1-3 ante, the Home Department should inform the Public Prosecutor that the Assistant Secretary to the Government of Bombay includes an Additional Assistant Secretary within the meaning of rule 12 of the Rules of Business, and accordingly he was competent to sign the Government order in question. His signature will have to be deemed as proper authentication of the order and it cannot be called in question on the ground that it is not an order made by the Governor. This being the position in law, it is not necessary to depute any officer to testify to the fact that the Additional Assistant Secretary had power to sign the order.

Sd/-P.M.L. 13/8
Remembrancer of Legal Affairs.

U.R. to H.D. (Spl.), No. 7727, dated the 13th Aug. 1948.

BXS. 7/6/48.

Legal Department.

Attention is invited to this Department U.R.No. 6305, dated the 6th July 1948, in which the question of the appointment of a Minister on a statutory Housing Corporation has been fully considered. In view of the position stated therein and the observations of the Hon'ble the Premier made on the occasion of the debate on the Ministers Salaries Bill it would not be desirable for H.E. (Labour) or any other Minister to accept membership of the Association.

Sd/-J.R.D. 18/8
Additional Secretary to
Government.

U.R. to Labour Deptt., No. 7889, dated the
18th August 1948.

BKS: 7/6/ 4c.

The power to issue passports to British subjects and British protected persons was a prerogative of the Crown which, as will be seen from the Government of India's letter of 4th January 1946, was delegated by His Majesty to His Excellency the Governor General with authority in turn to delegate the duty to such servants of the Crown in India as he might appoint. The delegation made by His Majesty in the year 1937 to the Governor General to issue passports in India does not appear to have been made under the Government of India Act, 1935. It is doubtful whether the omission of sections 2 and 3 of the Government of India Act can be construed to mean that all prerogatives of the Crown have ceased and have passed to the Governor General, although it has sometimes been argued that, where the equality of status of a Dominion has been asserted, every royal prerogative has by necessary intendment passed to the Governor General (see p.209 of Keith's Dominions as Sovereign States). The present delegation by the Governor General is consistent with either view that the Governor General is exercising the prerogative of the Crown as delegated to him or is exercising a prerogative which has passed to him by necessary intendment. In any case, this is a question for the Government of India to decide. It is evident from the telegram sent by the Government of India on the 22nd June 1948 that the Governor General has assumed that the function of issuing passports to British subjects and British protected persons is vested in him and that he could delegate the same to His Excellency the Governor of Bombay. The power to issue passports is independent of any statutory provision and does not fall under any of the items mentioned in the Seventh Schedule to the Government of India Act, 1935. The function of issuing passports is, outside the scope of section 124 of the Government of India Act, 1935.

Sd/-P.M.L.
23/8
Remembrancer of Legal Affairs.

U.A. to Passport Office No. 468-FConfl., dated
the 23rd August 1948.

BKS. 7/6/48.

Office of the R.L.A.

From the Rules set out in Appendix XIII of Volume II of the Bombay Public Works Department Manual, it would appear that the authority to sanction amounts of expenditure incurred on the maintenance, improvement, renewal or replacements of the official residences of His Excellency the Governor exceeding those specified in rule 2 is the Secretary of State. These rules seem to derive their authority from the provisions of paragraph 2 of the Third Schedule to the Government of India Act, 1935, as they existed before 15th August 1947. The India (Provisional Constitution) Order, 1947, which was made on the 14th August 1947 has adapted paragraph 2 of the Third Schedule with the result that the authority to fix the allowances of the Governor in respect of equipment and travelling upon appointment has passed to the Governor-General. In view of this change, it would appear that the additional amount that is now required to supplement the Government house grant will have to be sanctioned by the Governor-General.

2. This Department is not aware whether the Constituent Assembly has passed or is likely to pass any revised orders affecting Government house grants. Attention is, however, invited to Article 135(3) of the Draft Constitution of India and the Second Schedule thereto.

Sd/-P.M.L. 21/8
Remembrancer of Legal Affairs

U.R. to F.D., No. 7991, dated the 23rd August
1948.

BKS. 7/6/4c.

Office of the R.L.A.

In his opinion, No.385-Confl., dated the 19th July 1948, the Remembrancer of Legal Affairs observed:

"The Ministers chosen by the Governor under section 51 of the Government of India Act, 1935, are no doubt public servants and are dismissible from office by the Governor."

The Hon'ble the Premier desires that this statement should be examined and confirmed and that the Advocate General should be requested to advise.

The fact that ministers are dismissible from office by the Governor is clear enough. Section 51 of the Government of India Act, 1935, in terms enacts that ministers shall "hold office during his (Governor's) pleasure. As regards their being public servants, in *Emperor v. Sibnath Bankerji* (48 Bom.L.R. p.1) the Privy Council has held that a Minister is an officer subordinate to the Governor; and as he is an officer in the service or pay of the Crown, it follows that he is a public servant within the meaning of section 21-ninth clause (Cf. R.L.A.'s opinions Nos.8268, dated 12-2-47 and No.9332, dated 19-9-47). As however, the Hon'ble the Premier desires to have the Advocate General's opinion he is requested to advise.

Sd/-P.M.Iad.

11/8/48

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 7609 dated the 11th August 1948.

BKS. 7/6/ 48.

No.34 of 1948.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT
Bombay, 23rd August 1948.

U.R. to the Advocate General of Bombay, No.7609,
dated the 11th August 1948.

O P I N I O N.

I agree that the Ministers chosen by the Governor under Section 51 of the Government of India Act, 1935, are public servants and are dismissible from office by the Governor.

Id/-
Offg. Advocate General.

BKS. 7/6/ 40.

Office of the E.I.A.

As desired by the Hon'ble the Premier the Advocate General was consulted. A copy of his opinion is appended.

d/-P.M.L.

25/8

Remembrancer of Legal Affairs.

H. to H.D. , No. 479-Conf., dated the 26th
August 1948.

BKS. 7/6/ 40.

Office of the R.L.A.

The question referred to the R.L.A. for consideration is whether it would be competent for the Provincial Government to undertake legislation for licensing industries.

2. Entry 29 read with section 100 of the Government of India Act, 1935, empowers the Provincial Legislature to make laws with respect to production, supply and distribution of goods and also with respect to development of industries, subject to the provisions in List I with respect to the development of certain industries under Dominion control. The relevant provisions in List I are contained in entry 34 which refers to development of industries, where development under Dominion control is declared by Dominion law to be ~~xxxxxxx~~ expedient in the public interest. Reading the two entries together it will follow that the Provincial Legislature is competent to enact any law with respect to the production, supply and distribution of goods with respect to development of industries excluding those in respect of which a declaration is made by Dominion law in the sense of entry 34 in List I. Within this limited field the powers of the Provincial Legislature are, however, plenary and it would be competent for the Provincial Legislature to enact a law for licensing such industries, (that is, industries not taken out of their control by declaration made by Dominion law) with a view to regulate and control their ~~xxxx~~ development.

Sd/-P.M.L. 4/9
Remembrancer of Legal Affairs.

U.R. to E. & I.D. No. 8547 dt. 9th September 1948.

BKS. 7/6/48.

Holding a Departmental enquiry before dismissal of a temporary Govt. servant.

Government of India Act, 1935-sec. 240.
Civil Services (Classification, Control & Appeal) Rules -
 Rule 55.

Sub-section (1) of section 240 of the Government of India Act, 1935 provides that except as expressly provided by this Act every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure. This general rule which is expressly recognised and which exists independently of the statute is that Government servants hold office during His Majesty's pleasure, which means in effect at the pleasure of Government. That implies a power to dismiss or remove a Government servant at any time. But this section contains provisions in sub-sections (2), (3) and (4) for the benefit of the members of the public service. Sub-section (2) provides that no such person shall be dismissed from the service by any authority subordinate to that by which he was appointed. Sub-section (3) inter alia provides that no such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The intention of the Parliament in making these provisions is to protect the members of these services from arbitrary action by Government. It is clear from the provisions stated above that whenever a Government servant whether temporary or permanent, is to be removed from service he should ~~must~~ be given an opportunity to show cause as required by sub-section (3). Although under sub-section (1) the tenure of office of a Government servant

is during His Majesty's pleasure, sub-sections (2) (3) and (4) impose certain statutory obligations to be carried out before dismissal is effected, breach of which will give him a cause of action. These provisions are a limitation on the power of Crown to dismiss the members of the public service at pleasure (please see Secretary of State v. I.M. Hall, 1945 FCR 103 at p. 140). Further the procedure to be followed before an order of dismissal, removal or reduction is passed against Government servant under rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules is prescribed in rule 55 of the Civil Services (Classification, Control and Appeal) Rules. Neglect in the due observance of the provisions of this rule is liable to vitiate the whole proceedings. It is only when the discharge (a) of a person appointed on probation during the period of such probation, (b) of a person appointed, otherwise than under contract, to hold a temporary appointment, on the expiration of the period of that appointment, and (c) of a person engaged under a contract, in accordance with the terms of the contract, that a departmental inquiry as prescribed under rule 55 is not necessary (please see explanation to rule 33 and G.R.P. & U.D. No. 1581-34 dated 9-8-47). But in all other cases of discharge a departmental inquiry is necessary. Borrowing the remarks of Sir Richard Couch in the case of Gould v. Stuart, 1896 A.C. 575 at 578, it may be stated that these provisions which were manifestly intended for the protection and benefit of Government servants are inconsistent with importing into the contract of service the term that Government may put an end to it by

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recourse to the general law. In that case the provisions stated above would be superfluous, useless and delusive. Moreover it is an established principle of law that, wherever power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. Therefore it would not be legally in order that recourse should be held in this case to the general rule for removing or dismissing the delinquent Government servant. The view taken by the Secretary R.D. at p. 38 ante is not correct.

Sd/-P.M.L.

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Remembrancer of Legal Affairs.

U.R. to R.D. No. 494-Conf., dated 5th

September 1948.

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